

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GARY VAN WAEYENBERGHE,)
Petitioner)
vs.) CAUSE NO. 3:08-CV-456 RM
United States of America,) (arising out of 3:04-CR-87(01) RM)
Respondent)

OPINION AND ORDER

On October 13, 2009, the court denied Gary Van Waeyenberge's 28 U.S.C. § 2255 petition to vacate, set aside, or correct sentence on account of ineffective assistance of counsel. Mr. Van Waeyenberge has now filed a notice of appeal and motions for a certificate of appealability and leave to proceed *in forma pauperis*. For the reasons stated, these motions are DENIED.

To obtain a certificate of appealability Mr. Van Waeyenberge must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). This means he must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Miller-El v. Cockrell, 537 U.S. at 336. The court has reviewed the claims made in Mr. Van Waeyenberge's petition and has made a general assessment of their merits, *see*

id., and finds that Mr. Van Waeyenbergh is far from meeting his burden. The court's opinion and order denying Mr. Van Waeyenbergh's § 2255 petition [Doc. No. 99] found that Mr. Van Waeyenbergh's counsel's performance was, without doubt, objectively reasonable and in no way prejudicial to Mr. Van Waeyenbergh's defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The issues Mr. Van Waeyenbergh raised deserve no encouragement to proceed further and his motion for a certificate of appealability is denied.

An appeal may not be taken *in forma pauperis* if it is not taken in good faith. 28 U.S.C. § 1915(a)(3). The appointment of counsel during previous proceedings doesn't automatically entitle Mr. Van Waeyenbergh to proceed *in forma pauperis* on appeal. *See FED. R. APPELLATE PROC.* 24(a)(3)(A). On the other hand, the denial of a certificate of appealability doesn't automatically require the denial of a motion to proceed *in forma pauperis*. *Walker v. O'Brien*, 216 F.3d 626, 631-32 (7th Cir. 2000). Rather, the court must decide whether "a reasonable person could suppose that the appeal has some merit." *Id.* at 632. For the reasons stated in its denial of Mr. Van Waeyenbergh's § 2255 petition [Doc. No. 99], any appeal would not be taken in good faith, and the motion to proceed *in forma pauperis* is denied.

In summary,

- 1) Mr. Van Waeyenbergh's motion for a certificate of appealability [Doc. No. 104] is DENIED.
- 2) Mr. Van Waeyenbergh's motion for leave to proceed *in forma pauperis* [Doc. No. 103] is DENIED.

SO ORDERED.

ENTERED: December 10, 2009

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court

cc: G. Van Waeyenbergh
B. Brooke
United States Court of Appeals